Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LORI CRISAN and LISA DIDONATO,
Petitioners,

v.

A.G. EDWARDS & SONS, INC. and ANTHONY PIAZZA,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Can the Court of Appeals properly dismiss an appeal for lack of jurisdiction to review a District Court's "order compelling arbitration" in a gender-based hostile work environment case when the District Court did not order arbitration, but where it granted an alternative motion to dismiss the complaint with prejudice under the provisions of FRCP Rule 12(b)(6)?

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IN THE

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LORI CRISAN and LISA DIDONATO,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioners LORI CRISAN and LISA DIDONATO respectfully petition this Court for a Writ of Certiorari to review the Orders of the United States Court of Appeals for the Ninth Circuit made and entered on March 24, 1995, which orders dismissed Petitioners' appeals on the ground that the Court lacks jurisdiction to review the District Court's Order compelling arbitration in an embedded proceeding [1].

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[1] Pursuant to Supreme Court Rule 14.1(b) the parties to this petition are LORI CRISAN and LISA DIDONATO, petitioners, who filed separate complaints and appeals in the courts below, but whose interests are joined in a single question (Supreme Court Rule 12.1), and A.G. EDWARDS & SONS, INC., a corporation,

OPINIONS BELOW

No official or unofficial reports of opinions delivered in this case are known to exist (Rule 14.1(d)).

The grounds on which the jurisdiction of this Court is invoked (Rule 14.1(e)) are as follows:

(a) The United States Court of Appeals for the Ninth Circuit rendered an opinion in this case that is in direct conflict with the decision of the United States Court of Appeals for the Ninth Circuit in *Prudential Insurance Company of America v. Lai*, 42 F.3d 1299 (CA 9th, 1994), which is identical to the question on appeal in the instant case; and with the United States Court of Apepals for the Tenth Circuit in *Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953 (1994), which involves the same procedural question as is involved in the instant case (Rule 10.1(a)).

(b) The United States Court of Appeals for the Ninth Circuit has, in this case, so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, so as to call for an exercise of this Court's power of supervision (Rule 10.1(a)).

(c) The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided federal questions in a way that conflicts with applicable decisions of this Court (Rule 10.1(c)).

BASIS FOR FEDERAL JURISDICTION

28 U.S.C. § 1291; Civil rights act of 1964, 42 U.S.C. §§ 2000e, 2000e(2)(a); 9 U.S.C. § 16(a)(3); 28 U.S.C. § 1291. Respondents contend that the Federal Arbitration Act, 9 U.S.C. §§ 3 and 4 govern.

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and ANTHONY PIAZZA, respondents, who were the defendants and appellees in both actions in the court below.

Pursuant to Supreme Court Rule 14.1(e), petitioners state:

The date of the Orders sought to be reviewed are March 24, 1995[2]. This is an original petition. The provisions of Supreme Court Rule 12.3 are inapplicable. The statutory provisions believed to confer jurisdiction on this Court are the Fifth Amendment to the United States Constitution, 42 U.S.C. §§ 2000e and 2000e(2)(a), 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(3). Respondents contend that 9 U.S.C. §§ 3 and 4 govern.

Pursuant to Supreme Court Rule 14(f) the Constitutional provisions involved are the Fifth Amendment to the United States Constitution (Right to trial by jury), the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, 2000e(2)(a), 12 U.S.C. § 1291, and the Federal Arbitration Act, 9 U.S.C. §§ 3, 4.

STATEMENT OF THE CASE

Petitioners—female employees of a stock brokerage house—brought action against the brokerage house and its supervising manager in U.S. District Court for (1) Creating and maintaining an abusive and hostile work environment in violation of the Civil Rghts Act of 1964, 42 U.S.C. §§ 2000e and 2000e(2)(a); (2) intentional infliction of mental and emotional distress in violation of California law; and (3) intentional interference with business relationships in violation of California law.

Respondents Moved to Dismiss the Complaint (FRCP Rule 12(b)(6)) and concurrently Moved to Compel Arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 3 and 4. Respondents contended that (1)

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[2] Petitioners requested rehearing and suggested that the matter be considered *en banc*. The request for rehearing was denied and the suggestion for hearing *en banc* was rejected. However, since the petitioners are not out of time to file the petition based on the initial orders, these latter motions need not be considered.

Petitioners signed a Uniform Application for Securities Industry Registration (U-4 Form); and (2) The U-4 Form required that disputes involving sexual harassment be resolved through mandatory arbitration.

On May 25, 1994, the United States District Court for the Northern District of California, Spencer Williams, J., dismissed the complaints without leave to amend, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 935 (CA 9th, 1992), but did *not* rule on the motion to compel arbitration (Appendix "C" and "D"), stating, at page 1, lines 13-20:

> "On May 25, 1994, the Court heard oral arguments regarding (1) defendants' Motion to Dismiss the First Amended Complaint and Compel Arbitration, and (2) defendants' Motion to Strike Plaintiffs' Opposition. Having carefully considered the relevant facts and law, the materials submitted by the parties and the arguments of counsel, the Court hereby (1) dismisses the First Amended Complaint without leave to amend and (2) denies defendants' Motion to Strike."

Petitioners timely appealed.

While the appeal was pending, the Ninth Circuit, in *Prudential Insurance Company v. Lai*, 42 F.3d 1299 (1994), held that the District Court could not compel arbitration under the same circumstances as exist in the instant case.

Respondents moved to dismiss the appeal on the ground that the Appeals Court lacks jurisdiction to review the District Court's order compelling arbitration in an embedded proceeding, *Prudential Insurance Company v. Lai*, 42 F.3d 1299, 1301 (1994).

Petitioners counter moved to vacate the District Court's Order of Dismissal and to Remand the case to the District Court for determination of whether or not the District Court should compel arbitration and stay the prosecution of the case pending arbitration.

The Court of Appeals for the Ninth Circuit ruled as follows:

> "Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1301 (9th Cir. 1994) (this court lacks jurisdiction to review district court's order compelling arbirtation in embedded proceeding). All pending motions are denied as moot [3]."
>
> —Appendix "A," "B."

The instant petition follows.

REASONS FOR GRANTING THE PETITION

THE APPEALS COURT ERRED IN DISMISSING THE APPEAL RATHER THAN VACATING THE DISMISSAL AND REMANDING THE CASE TO THE DISTRICT COURT FOR FURTHER ACTION.

Although petitioners believe that a dispositive ruling of this court harmonizing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 Sup. Ct. 1011 (1974) and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L.Ed.2d 26, 111 Sup. Ct. 1647 (1991), in light of this court's holding in *Harris v. Forklift Systems, Inc.*, 510 U.S. ——, 126 L.Ed.2d 295, 114 Sup. Ct. 367 (1993), would be desirable [4], this Court need not address the broader issue examined in those cases.

Rather, this Court need only concern itself with the procedural error committed by the Ninth Circuit in light of the actual ruling of the District Court when it abro-

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[3] Thereafter, petitioners filed a request for reconsideration and a suggestion for hearing *en banc* which were denied.

[4] Since this matter has been the subject of significant press coverage in the *Wall Street Journal*, June 9, 1994 (Pages 1 and A6) and August 18, 1994 (Pages C1 and C11) and the New York Times, April 26, 1995 (Pages C7, C8) and is presently the subject of a pending Congressional Bill, H.R. 4981 introduced in the 103d Congress, August 17, 1994, it is obviously an important social issue.

gated jurisdiction in what it claimed was the holding in *Prudential Insurance Company of America v. Lai,* 42 F.3d 1299 (CA 9th, 1994).

The District Court's Order of May 25, 1994 dismissed the complaint with prejudice and terminated the litigation. It did *not* compel arbitration and, indeed, it did not even address the issue. As such, it constituted a final decision.

On December 20, 1994, the Ninth Circuit decided *Prudential Insurance Company of America v. Lai,* 42 F.3d 1299 (CA 9th, 1994), which effectively disposed of the underlying issue on appeal to the Ninth Circuit in the instant case. Recognizing that the Ninth Circuit would have to rule in accordance with *Prudential* in this case, defendants moved the court for an order dismissing the appeal for lack of jurisdiction to hear the merits of the appeal.

Respondents could not truthfully state that the District Court *had* ordered the matter to arbitration, since the District Court had not ruled one way or the other on the issue. Thus, respondents argued that the District Court's ruling "had the *effect* of compelling [Petitioners'] federal and state law claims to arbitration." (2:7-8 of Respondents' Memorandum in support of Motion to Dismiss).

The District Court had *dismissed the complaint without leave to amend.* That order gave the petitioners only three alternatives:

1) They could attempt to seek arbitration through NASD or NYSE channels (although they had *not* been ordered or compelled to do so);

2) They could abandon their claim for hostile work environment based on gender, or

3) They could appeal the District Court's decision to the Ninth Circuit Court of Appeals, which they did.

The Court was faced with a similar situation in *Adair Bus Sales, Inc. v. Blue Bird Corporation,* 25 F.2d 953 (CA 10th, 1994). The court stated, at 25 F.3d 953, 955:

> "Had the District Court properly granted defendant's motion for a stay, the stay order would have been interlocutory because the plaintiff sought the arbitrability of the dispute. We would have no appellate jurisdiction. *Because, however, the appeal is presented to us upon the District Court's order of dismissal, we have appellate jurisdiction, 28 U.S.C. § 1291.* We decline to reach the merits of the plaintiff's appeal in light of our adoption of the majority view discouraging immediate appellate review in a proceeding in which relief other than a determination of arbitrability is sought. We therefore *vacate* the District Court's order of *dismissal* and *remand* for entry of a stay pending arbitration."

The differentiating factor here is that in *Adair* the District Court had dismised the complaint *and ordered the parties to proceed to arbitration.*

Not so in the instant case. Here, the District Court simply dismissed the Complaint without leave to amend.

Unquestionably, the District Court's Order was incomplete. If the Court had compelled arbitration, the order would not have been appealable, *Perera v. Siegel Trading Co.*, 951 F.2d 780 (CA 7th, 1992). But here the court did *not* order the parties to arbitrate and thus the matter was instantly appealable, 9 U.S.C. § 16(a)(3).

Undoubtedly the Ninth Circuit is caught on the horns of a dilemma. If it vacates the District Court's Order of Dismissal Without Leave to Amend and remands the matter to the District Court with instructions to rule on whether or not the Petitioners must arbitrate, the District Court *cannot* order arbitration for to do so would be to fly in the teeth of *Prudential Insurance Company of America v. Lai, supra,* 42 F.3d 1299 (CA 9th 1994).

But this panel of the Ninth Circuit cannot escape the clear ruling of *Prudential* by trying procedurally to abdicate its jurisdiction by relying on an Order of Dismissal which *does not say what this panel of the Ninth Circuit claims it says*!

CONCLUSION

For the reasons set forth above, this Court should grant the Petition for Writ of Certiorari and, upon review, reverse the Orders of the United States Court of Appeals for the Ninth Circuit and direct that Court to vacate the District Court's Order of Dismissal and remand the case to the District Court for an Order on Respondents' alternative motion to compel arbitration in light of *Prudential Insurance Company of America v. Lai*.

Respectfully submitted,

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Dated: June 15, 1995

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APPENDICES

APPENDIX A

[Filed Mar. 24, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16127

DC# CV-94-20025-SMW
Northern California
(San Jose)

LORI CRISAN,
Plaintiff-Appellant,

vs.

A.G. EDWARDS & SONS, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: SNEED, POOLE and BRUNETTI, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299, 1301 (9th Cir. 1994) (this court lacks jurisdiction to review district court's order compelling arbitration in embedded proceeding).

All pending motions are denied as moot.

APPENDIX B

[Filed Mar. 24, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16018

DC# CV-94-20026-SMW
Northern California
(San Jose)

LISA DIDONATO,
Plaintiff-Appellant,

vs.

A.G. EDWARDS & SONS, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: SNEED, POOLE and BRUNETTI, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See Prudential Ins. Co. of America v. Lai,* 42 F.3d 1299, 1301 (9th Cir. 1994) (this court lacks jurisdiction to review district court's order compelling arbitration in embedded proceeding).

All pending motions are denied as moot.

APPENDIX C

[Filed May 25, 1994]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 94-20025 SW

LORI CRISAN,

Plaintiff,

v.

A.G. EDWARDS & SONS, INC., and ANTHONY PIAZZA,

Defendants.

ORDER DISMISSING FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND; DENYING DEFENDANTS' MOTION TO STRIKE

On May 25, 1994, the Court heard oral argument regarding (1) Defendants' Motion to Dismiss the First Amended Complaint and to Compel Arbitration; and (2) Defendants' Motion to Strike Plaintiff's Opposition. Having carefully considered the relevant facts and law, the materials submitted by the parties and the arguments of counsel, the Court HEREBY (1) DISMISSES the First Amended Complaint WITHOUT LEAVE TO AMEND and (2) DENIES Defendants' Motion to Strike.

BACKGROUND

On November 27, 1992, Defendant A.G. Edwards, a retail stock brokerage, hired Plaintiff Lori Crisan to work as a registered sales assistant at its Monterey office. While she was employed at A.G. Edwards, Crisan alleges that Defendant Anthony Piazza, the Managing Agent of the

Monterey office, (1) regularly discussed sexual behavior and birth control methods; (2) told his female employees that he "didn't want anyone getting pregnant;" (3) frequently and publicly used profane language when referring to female employees; (4) made explicit comments regarding his genitalia; (5) falsely accused Crisan of spreading rumors that he had lied during an unemployment hearing; (6) imitated the way he believed Asians and Blacks talk; (7) referred to his employees as "guys;" (8) physically assaulted and manhandled her; (9) perpetually used foul and abusive language; (10) created a "reign of terror" in the office by shouting epithets in public places and hurling objects.

After she was terminated, Crisan notified A.G. Edwards of her grievances. A.G. Edwards sent out an attorney, Thomas Mickes, to investigate. Mickes took statements from Crisan, Piazza, and at least four other female employees. However, according to Crisan, Mickes attempted to cover up the women's testimony by preparing false affidavits and having them sign them without first showing them to her attorney. Crisan also alleges that A.G. Edwards transferred one of the women to Denver, Colorado in an effort to make it more difficult for her to "adduce competent testimony" and that it stalled hearings before the California Labor Commisisoner.

On January 11, 1994, Crisan filed a Complaint alleging that Defendants' conduct (1) created an abusive and hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e and 2000e-2(a); (2) constituted intentional infliction of mental and emotional distress in violation of California law; and (3) constituted intentional interference with her business relationships in violation of California law.

On February 11, 1994, Defendants filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and a Motion to

Compel Arbitration pursuant to §§ 3 and 4 of the Federal Arbitration Act, 9 U.S.C. § 3 and 4. Defendants' theory was that (1) on November 27, 1992, Crisan signed a Uniform Application for Securities Industry Registration (hereafter the "U-4 Form"); and (2) the U-4 Form required that disputes involving sexual harassment be resolved through mandatory arbitration.

On April 8, 1994, Crisan filed a First Amended Complaint which included a claim for rescission of her December 8, 1992 employment agreement. Crisan alleged, among many other things, that Defendants had used the arbitration provision contained in her employment agreement "as a sword and club that would force [her] to submit to violations of her dignity based on gender, abrogating her right to trial by jury." The First Amended Complaint makes no mention of her U-4 Form.

On April 25, 1994, Defendants filed a Motion to Dismiss Crisan's First Amended Complaint and Motion to Compel Arbitration on essentially the same grounds contained in their February 11, 1994, Motions. On May 18, 1994, Defendants filed a Motion to Strike Crisan's May 16, 1994 opposition to their April 25, 1994 Motions on the ground that the opposition was served less than fourteen days before the hearing. *See* Local Rules 220-3 and 100-3; Standing Order 3.

DISCUSSION

A. *Defendants' Motion to Dismiss the First Amended Complaint and to Compel Arbitration*

On November 27, 1992, Crisan executed a U-4 Form which provided in pertinent part that she agreed to "arbitrate any dispute, claim or controversy that may arise between [herself] and [A.G. Edwards], or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which [she] register[ed], as indicated in Ques-

tion 10 [of the U-4 Form]." Straeder Decl., Exh. A. In Question 10, Crisan registered with the New York Stock Exchange and therefore became subject to Rule 347 of the NYSE Rules of Arbitration, which provides that

> [a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

NYSE Guide (CCH) ¶ 2347 (1993). In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991), the Supreme Court held that Rule 347 requires mandatory arbitration of disputes arising under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* The Ninth Circuit has subsequently held, based on *Gilmer*, that an individual may be compelled to arbitrate disputes arising under Title VII. *See Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992). Furthermore, where a plaintiff's federal claim is subject to arbitration, her related state law claims are as well. *See Saari v. Smith Barney, Harris Upham & Co., Inc.*, 968 F.2d 877, 883 (9th Cir. 1992). Accordingly, if Crisan's U-4 Form is valid and enforceable, her case must be dismissed and sent to arbitration.

Crisan has made a rather confusing attempt to avoid arbitration. In her First Amended Complaint, she alleges that the arbitration clause contained in her December 8, 1992, employment agreement was invalid and should be rescinded. First Amended Complaint, ¶¶ 7-17. However, neither Defendants' February 11, 1994 Motion to Dismiss and to Compel Arbitration nor their April 25, 1994 Motion to Dismiss the First Amended Complaint and to Compel Arbitration have anything to do with her

December 8, 1992, employment agreement. They are based solely on her U-4 Form, signed on November 27, 1992. Accordingly, the claim for rescission of her employment agreement contained in the First Amended Complaint is completely irrelevant to this case.

Based on her opposition, filed April 8, 1994, along with the First Amended Complaint, it appears that Crisan intended to allege in her First Amended Complaint that her U-4 Form was invalid and should be rescinded. However, even if the allegations of the First Amended Complaint are construed as referring to Crisan's U-4 Form, there would still be no basis for denying Defendants' Motions.

The Supreme Court has stated in dicta that, in considering whether to enforce such an arbitration clause, "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer*, —— U.S. ——, 111 S.Ct. at 1656 (internal quotations omitted). The only allegations which Crisan makes in her First Amended Complaint which can be construed as applying to the arbitration provision of her U-4 Form are that (1) she did not realize or intend that it would require arbitration of claims for sexual harassment; (2) A.G. Edwards used the arbitration provision "as a sword and club that would force [her] to submit to violations of her dignity based on gender;" (3) she would be denied her constitutional right to a trial by jury if she is forced to arbitrate her dispute; and (4) by requiring that she arbitrate her dispute, the agreement frustrates the policies underlying Title VII.

None of the above claims have merit. The broad and inclusive language of the arbitration provision belies her first argument. The fallacy of her second allegation is made clear by the fact that Form U-4 was not even written by A.G. Edwards, but is rather a standard form

signed by all applicants for registration with the exchanges. Were the Court to accept her third argument, it would essentially be holding that all arbitration clauses are unenforceable. Finally, her fourth argument, that arbitration frustrates the purpose of Title VII, is expressly contradicted by the Ninth Circuit's holding in *Mago,* 956 F.2d 935, which states that employees may be compelled to arbitrate such disputes.

B. *Defendants' Motion to Strike Crisan's Opposition, Filed May 16, 1994*

Defendants correctly contend that Crisan failed to file her May 16, 1994 opposition at least fourteen days before the hearing on their Motions. Local Rule 220-3. Based on Local Rule 100-3 and Standing Order 3, the Court has the discretion to disregard Crisan's opposition or to fine her or her attorney a minimum of $500 for filing it out of time. However, the Court will accept Crisan's opposition and will not levy a fine.

IT IS SO ORDERED.

DATED: 25 May 1994

/s/ Spencer Williams
United States District Judge

APPENDIX D

[Filed May 25, 1994]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 94-20026 SW

LISA DIDONATO,

Plaintiff,

v.

A.G. EDWARDS & SONS, INC., and ANTHONY PIAZZA,

Defendants.

ORDER DISMISSING FIRST AMENDED COMPLAINT WITHOUT LEAVE TO AMEND; DENYING DEFENDANTS' MOTION TO STRIKE

On May 25, 1994, the Court heard oral argument regarding (1) Defendants' Motion to Dismiss the First Amended Complaint and to Compel Arbitration; and (2) Defendants' Motion to Strike Plaintiff's Opposition. Having carefully considered the relevant facts and law, the materials submitted by the parties and the arguments of counsel, the Court HEREBY (1) DISMISSES the First Amended Complaint WITHOUT LEAVE TO AMEND and (2) DENIES Defendants' Motion to Strike.

BACKGROUND

On July 23, 1992, Defendant A.G. Edwards, a retail stock brokerage, hired Plaintiff Lisa DiDonato to work as a registered sales assistant at its Monterey office. While she was employed at A.G. Edwards, DiDonato alleges that Defendant Anthony Piazza, the Managing

Agent of the Monterey office, (1) called her into his office to discuss the method of both control which she was using and subsequently discussed the method which she used with other female employees; (2) called her the "nigger of the office" on several occasions, sometimes within the hearing of other employees; (3) frequently and publicly told his female employees that he "didn't want anyone getting pregnant and having babies around here;" (4) frequently and publicly used profane language when referring to female employees; (5) made explicit comments regarding his genitalia; (6) frequently referred to female employees as "having female problems;" (7) told DiDonato and other employees that he viewed Plaintiff "in the same light as the guy who stabbed Monica Seles —she's crazy and suicidal;" (8) told her that he "owned her," since no one else would have given her the opportunity to become a Series 7 registered securities employee; (9) frequently and publicly imitated the way he believed Asians and Blacks talk; (10) referred to his employees as "guys;" (11) physically assaulted and manhandled her; (12) perpetually used foul and abusive language; (13) falsely accused her of having "legal problems" and lying on her employment application; (14) lied under oath at her unemployment hearing and induced another female employee to do so; (15) told other employees, as well as individuals at Dean Witter Reynolds, that she was "crazy," was a "drug addict," and "deserved a good beating:" (16) told certain employees that he could not fire another female employee because she was giving sexual favors to certain male employees; (17) created a "reign of terror" in the office by shouting epithets in public places and hurling objects.

After she was terminated, DiDonato notified A.G. Edwards of her grievances. A.G. Edwards sent out an attorney, Thomas Mickes, to investigate. Mickes took statements from DiDonato, Piazza, and at least four other female employees. However, according to DiDonato, Mickes attempted to cover up the women's tes-

timony by preparing false affidavits and having them sign them without first showing them to her attorney. DiDonato also alleges that A.G. Edwards transferred one of the women to Denver, Colorado in an effort to make it more difficult for her to "adduce competent testimony" and that it stalled hearings before the California Labor Commissioner.

On January 11, 1994, DiDonato filed a Complaint alleging that Defendants' conduct (1) created an abusive and hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e and 2000e-2(a); (2) constituted intentional infliction of mental and emotional distress in violation of California law; and (3) constituted intentional interference with her business relationships in violation of California law.

On February 11, 1994, Defendants filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and to Compel Arbitration pursuant to §§ 3 and 4 of the Federal Arbitration Act, 9 U.S.C. § 3 and 4, on the ground that DiDonato's July 23, 1992 employment application contained a mandatory arbitration clause.

On April 8, 1994, DiDonato filed a First Amended Complaint, which included a claim for rescission of what she described as her July 23, 1992 "employment agreement." DiDonato alleged, among many other things, that Defendants had used the arbitration provision contained in her employment agreement "as a sword and club that would force [her] to submit to violations of her dignity based on gender, abrogating her right to trial by jury."

On April 25, 1994, Defendants filed a Motion to Dismiss DiDonato's First Amended Complaint on essentially the same grounds as were contained in their February 11, 1994, Motions. On May 18, 1994, Defendants filed a Motion to Strike DiDonato's opposition to their

April 25, 1994 Motions on the ground that the opposition was served less than fourteen days before the hearing on their Motions. *See* Local Rules 220-3 and 100-3; Standing Order 3.

DISCUSSION

A. *Defendants' Motion to Dismiss the First Amended Complaint and to Compel Arbitration*

On July 23, 1992, DiDonato signed an employment application which provided as follows:

> In consideration of A.G. Edwards & Sons, Inc. undertaking the aforementioned investigation and consideration of my application for employment, I agree that any controversy or dispute arising between me and A.G. Edwards & Sons, Inc. in respect to this application, A.G. Edwards & Sons, Inc.'s consideration of my employment, my employment by A.G. Edwards & Sons, Inc., or the termination of that employment by A.G. Edwards & Sons, Inc. shall be submitted for arbitration before the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc.

Straeder Decl., Exh. A.

An individual may be compelled to arbitrate a dispute arising under Title VII based on an arbitration provision contained in his or her employment application. *Mago v. Shearson-Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992). Furthermore, where a plaintiff's federal claim is subject to arbitration, his or her related state law claims are as well. *See Saari v. Smith Barney, Harris Upham & Co., Inc.*, 968 F.2d 877, 883 (9th Cir. 1992). Accordingly, if the arbitration clause in DiDonato's employment application is valid, her case must be dismissed and sent to arbitration.

DiDonato has made a rather confusing attempt to avoid arbitration. In her First Amended Complaint, she al-

leges that the arbitration clause contained in her July 23, 1992 "employment agreement" was invalid and should be rescinded. First Amended Complaint, ¶ 7. The First Amended Complaint then goes on to allege various grounds for rescission occurring on or about December 9, 1992. First Amended Complaint, ¶¶ 8-17. DiDonato's July 23, 1992 employment application is not mentioned anywhere in the First Amended Complaint. Accordingly, the claim for rescission of her "employment agreement" contained in the First Amended Complaint is completely irrelevant to this case.

Based on her opposition, filed on April 8, 1994 along with the First Amended Complaint, it appears that DiDonato intended to allege in her First Amended Complaint that her July 23, 1992 employment application was invalid and should be rescinded. However, even if the allegations of the First Amended Complaint are construed as referring to DiDonato's employment application, there is still no basis for denying Defendants' Motions.

The Supreme Court has stated in dicta that, in considering whether to enforce an arbitration clause, the "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Gilmer v. Interstate/Johnson Lane Corp.*, —— U.S. ——, 111 S.Ct. 1647, 1656 (1991) (internal quotations omitted). The only allegations which DiDonato makes in her First Amended Complaint which can be construed as applying to the arbitration provision of her employment application are that (1) she did not realize or intend that it would require arbitration of claims for sexual harassment; (2) A.G. Edwards used the arbitration provision "as a sword and club that would force [her] to submit to violations of her dignity based on gender;" (3) she would be denied her constitutional right to a trial by

jury if she is forced to arbitrate her dispute; (4) that there was no consideration to support the arbitration agreement; and (5) by requiring that she arbitrate her dispute, the agreement frustrates the policies underlying Title VII.

None of the above claims have merit. The broad and inclusive language of the arbitration provision belies her first argument. Were the Court to accept her second and third arguments, it would essentially be holding that all arbitration agreements are unenforceable. Her fourth argument, that there was no consideration for the arbitration provision, is directly contradicted by the language of the agreement. Finally, her fifth argument, that arbitration frustrates the purpose of Title VII, is expressly contradicted by the Ninth Circuit's holding in *Mago*, 956 F.2d 935, which states that employees may be compelled to arbitrate such disputes.

B. *Defendants' Motion to Strike DiDonato's Opposition, Filed May 16, 1994*

Defendants correctly contend that DiDonato failed to file her May 16, 1994 opposition at least fourteen days before the hearing on their Motions. *See* Local Rule 220-3. Based on Local Rule 100-3 and Standing Order 3, the Court has the discretion to disregard DiDonato's opposition or fine her or her attorney a minimum of $500 for filing it out of time. However, the Court will accept DiDonato's opposition and will not levy a fine.

IT IS SO ORDERED.

DATED: 25 May 1994

/s/ Spencer Williams
United States District Judge

APPENDIX E

[Filed May 4, 1995]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16127

DC# CV-94-20025-SMW
Northern California
(San Jose)

LORI CRISAN,
Plaintiff-Appellant,

vs.

A.G. EDWARDS & SONS, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: SNEED, POOLE and BRUNETTI, Circuit Judges

The petition for rehearing is denied. The suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
JUL 27 1995

No. 94-2052

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

Lori Crisan and Lisa DiDonato,

Petitioners,

v.

A.G. Edwards and Sons, Inc. and Anthony Piazza,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

RESPONSE TO PETITIONERS' QUESTION PRESENTED

The Petitioners' question presented fails to precisely articulate the only issue properly before this Court. For reasons more fully stated in this Brief in Opposition to Petition for Writ of Certiorari, Petitioners' question presented misrepresents the issue decided by the Ninth Circuit Court of Appeals. In granting Respondents' Motions to Dismiss Petitioners' Appeals, the Ninth Circuit clearly held that it lacked jurisdiction to consider either appeal where the Respondents' Motions to Dismiss and Compel Arbitration were embedded in substantive issues pending before the District Court. Therefore, the only issue properly before this Court is:

QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals properly dismissed Petitioners' appeals for lack of jurisdiction where Respondents' Motions to Dismiss and Compel Arbitration were embedded in Petitioners' substantive suits pending before the district court.

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INTRODUCTION

Certiorari should not be granted in this case. The proper issue, which Petitioners fail to recognize, is whether the district court's orders dismissing Petitioners' cases and sending Petitioners to arbitration were embedded in Petitioners' substantive claims. If the proceedings were embedded, the Ninth Circuit Court of Appeals was correct in determining that orders compelling arbitration decided in the context of "embedded proceedings" were interlocutory orders, and were not final appealable decisions under the Federal Arbitration Act, 9 U.S.C. § 16.

In this case, the district court's orders which had the effect of compelling Petitioners' federal and state law claims to arbitration were not final decisions under 9 U.S.C. § 16 and, therefore, the Ninth Circuit had no subject-matter jurisdiction to hear the merits of the appeals. The distinction between embedded and independent proceedings for appealability purposes has been recognized by at least the First, Second, Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuit Courts of Appeal and was explicitly recognized by the Ninth Circuit for the first time in its recent decision *Prudential Ins. Co. v. Lai,* 42 F.3d 1299 (9th Cir. 1994).

OPINIONS BELOW

No official reports of opinions delivered in this case are known to exist. The district court's decision in *Crisan v. A.G. Edwards and Sons Inc., Anthony Piazza and Does I - L*, however, appears as an unpublished opinion at No. 94-20025 SW, 1994 U.S. Dist. LEXIS 8648 (N.D. Cal. May 25, 1994).

JURISDICTION

Petitioners incorrectly cite 28 U.S.C. § 1291 and the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(2)(a), as providing a basis for jurisdiction for this appeal. Neither of these statutes is relevant to the issue before this Court. Title 28 U.S.C. § 1291 states that courts of appeal have jurisdiction over final orders issued by district courts. The Ninth Circuit correctly concluded that because the district court's orders in these matters were interlocutory rather than final orders, it had no jurisdiction to hear Petitioners' appeals. Hence, Petitioners citation of this statutory authority is erroneous.

The Civil Rights Act of 1964 is relevant only with respect to Petitioners' underlying claims of discrimination. The Act provides no jurisdictional basis for appeal because no determination has been made on the merits of Petitioners' Title VII claims.

Furthermore, Petitioners' citation to the Fifth Amendment to the United States Constitution is inapposite. Petitioners have cited the Fifth Amendment as granting the "right to trial by jury." Petition for Writ of Certiorari at 3. This citation is incorrect as the Fifth Amendment makes no mention of such right, and because the Seventh Amendment, which does grant a right to trial by jury, only applies in common law cases. The instant case is rooted in statutory rights, not common law.

Petitioners' citation to 12 U.S.C. § 1291 as providing jurisdiction for this appeal is baffling. This section involves the National Agricultural Credit Corporations and was repealed in 1959.

In addition, Petitioners have not offered any special or important reason, either in their jurisdictional statement or

in their argument, why this case merits the Court's attention. Supreme Court Rule 10 provides as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
> >
> > (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
> >
> > (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but

> should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioners have erroneously implied that the decisions of the Ninth Circuit Court of Appeals conflict with other decisions of any United States court of appeals. In fact, all of the courts of appeal which have addressed the precise issue in this case have consistently held in the same manner as the Ninth Circuit. Nor do Petitioners contend that the Ninth Circuit Court of Appeals decision conflicts with applicable decisions of this Court. Petitioners do allege that the question of federal law presented in this case should be decided by the Court. However, Petitioners have failed to provide any substantive reasons, much less persuasive reasons, why the issue in this case may correctly be characterized as "an important question of federal law."

STATEMENT OF CASE

On or about January 11, 1994, Petitioners Crisan and DiDonato filed separate three count complaints for damages in the United States District Court, Northern District of California against A. G. Edwards & Sons, Inc.,[1] Anthony Piazza and Does I through L.[2] In the first count of each complaint, Petitioners alleged that they were subjected to hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964. In their remaining counts, Petitioners asserted pendent state claims for intentional infliction of emotional distress and intentional interference with business relations pursuant to California law. On or about February 11, 1994, Respondents moved to dismiss Petitioners' complaints and to compel arbitration.

In response to the motions to dismiss and to compel arbitration, on April 8, 1994, Petitioners filed first amended complaints in which they added a claim for rescission of the arbitration provisions which formed the basis of Respondents' motions. On April 25, 1994, Respondents again moved to dismiss the first amended complaints and to compel arbitration on essentially the same grounds as expressed in their first motions.

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[1] As required by Supreme Court Rule 29, the following constitutes all parent companies and subsidiaries (except wholly owned subsidiaries) of Respondent A.G. Edwards & Sons, Inc.:

A.G. Edwards & Sons, Inc.

[2] Because Petitioners have consolidated their two cases for the purposes of their Petition for Writ of Certiorari, Respondents have discussed the claims of both Petitioners.

On May 25, 1994, the United States District Court for the Northern District of California ruled in favor of Respondents and dismissed Petitioners' first amended complaints without leave to amend, thus compelling their claims to arbitration. On or about June 13, 1994, Petitioners filed timely notices of appeal to the Ninth Circuit Court of Appeals.

On December 20, 1994, the Ninth Circuit Court of Appeals decided *Prudential*, where the court for the first time recognized that an order directing a case to arbitration is not appealable when that determination is "embedded" in substantive claims asserted by the plaintiff. *See* 42 F.3d at 1301.

On February, 10 1995, Respondents filed Motions to Dismiss Petitioners' appeals, based on the embedded proceeding theory. On March 24, 1995, the Ninth Circuit Court of Appeals granted Respondents' Motions to Dismiss stating:

> Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See Prudential Ins. Co. of America v. Lai,* 42 F.3d 1299, 1301 (9th Cir. 1994) (this court lacks jurisdiction to review district courts' order compelling arbitration in embedded proceeding).
>
> All pending motions are denied as moot.

Petition for Writ of Certiorari at Appendices A and B.

On March 29, 1995, Petitioners filed a Petition for Rehearing and Suggestion for Rehearing En Banc by the Ninth Circuit Court of Appeals. On May 4, 1995, the Ninth Circuit rejected Petitioners' request.

The Statement of the Case found in the Petition for Writ of Certiorari is in error in at least the following respects:

1. Petitioners misstate Respondents' position with regard to the applicable arbitration provision involving Petitioner DiDonato. Although Respondents' Motion to Dismiss and Compel Arbitration filed with the district court with respect to Petitioner Crisan was based on the arbitration clause in her Uniform Application for Securities Industry Registration (U-4 Form), Respondents have repeatedly informed Petitioners, the district court, and the court of appeals, that DiDonato never executed a U-4 Form. Rather, the arbitration clause applicable to her claims is found in her employment application. *See* Petition for Writ of Certiorari at 11a-13a. Hence, Petitioners' statement in their Petition that "Respondents contended that (1) Petitioners signed a Uniform Application for Securities Industry Registration (U-4) Form . . .," (Petition for Writ of Certiorari at 4), is inaccurate and misleading.

2. Petitioners also state that the district court did not rule on Respondents' Motions to Compel Arbitration. Petition for Writ of Certiorari at 4. This representation is inaccurate. Respondents' Motions were entitled "Motion to Dismiss and Compel Arbitration." The motions were granted. Furthermore, as clearly demonstrated in the district court's orders, *see* Petition for Writ of Certiorari at Appendices C and D, the court's entire discussion revolves around the enforceability of the arbitration clauses and the need to compel arbitration. For example, in its discussion of the arbitrability issues, the district court concludes, "if Crisan's U-4 Form is valid and enforceable, her case ***must be dismissed and sent to arbitration***." Petition for Writ of Certiorari at 6a (emphasis added). After rejecting Crisan's "rather

confusing attempt to avoid arbitration," the court dismissed Crisan's case as improperly before the court because the claims were subject to valid mandatory arbitration provisions.[3]

3. Accordingly, Petitioners' contention that "It [the district court] did ***not*** compel arbitration and, indeed, it did not even address the issue," (Petition for Writ of Certiorari at 6), is a blatant misstatement of the record. This Court need only review the district court's orders to determine the extent of Petitioners' misstatement.

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[3] The district court underwent the same thorough discussion of the reasons for enforcing the arbitration clause applicable to DiDonato's case. The thrust of the arbitrability analysis differed only in the court's recognition that "[a]n individual may be compelled to arbitrate a dispute arising under Title VII on an arbitration provision contained in his or her employment application." *See* Petition for Writ of Certiorari at 12a.

REASONS WHY THE PETITION SHOULD BE DENIED

In this case, the only issue presented is an exceedingly narrow and precise jurisdictional issue. Despite Petitioners' efforts to interject issues relating to the merits of their underlying, substantive claims,[4] the sole issue

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[4] In their Petition, Petitioners express their desire to have this Court "harmonize" its rulings in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), in light of the Court's recent holding in *Harris v. Forklift Systems, Inc.*, 510 U.S. _, 126 L.Ed.2d 295, 114 S. Ct. 367 (1993). Clearly, these cases are completely irrelevant to the narrow issue presented in this case and Petitioners' reference to these cases represents an inappropriate attempt to introduce matters not properly before this Court. In addition, Petitioners continue to mistakenly rely on the *Harris v. Forklift Systems* case. As Respondents have previously indicated in numerous briefs submitted to the district court and the Ninth Circuit, the *Harris* decision has no bearing on the arbitrability of Petitioners' claims and their continuing citation of that case as being somehow in support of their position remains wholly without legal merit. Similarly, Petitioners' reference and citation to articles in the *Wall Street Journal* and pending legislation regarding the propriety and fairness of arbitration in certain situations is nothing more than a not so subtle attempt to mislead this Court with respect to the only issue presented in this case. Although Petitioners suggest that this Court review the district court's decision with respect to the arbitrability of their claims, that matter is not properly before this Court. Rather, the sole issue properly presented in this case is whether the Ninth Circuit properly concluded that it lacked jurisdiction to hear

presented for review is whether the Ninth Circuit Court of Appeals properly dismissed Petitioners' appeals for lack of jurisdiction. In dismissing Petitioners' appeals, the Ninth Circuit correctly applied the holding of its recent ruling in *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *pet. for cert. filed* (May 22, 1995), and concluded that it lacked jurisdiction to review the district court's orders compelling arbitration in embedded proceedings. The Ninth Circuit's decision in the case at bar and in *Prudential* were based on uniform and well-established law.

Accordingly, the Petition should be denied because (i) the Petition fails to establish that the district court's orders were final rather than interlocutory; (ii) the Petition cites no cases in conflict with the Ninth Circuit's decisions to dismiss the appeals for lack of jurisdiction; and (iii) the Ninth Circuit's decisions dismissing the appeals for lack of jurisdiction are correct, and are supported by numerous cases not cited in the Petition.

I. The Court of Appeals Correctly Dismissed The Appeals For Lack Of Jurisdiction and Properly Concluded That The District Court's Orders Which Had The Effect Of Compelling Arbitration Were Interlocutory Orders That Were Not Immediately Appealable.

Contrary to Petitioners' assertions, the district court's May 25, 1994 orders which had the effect of compelling Petitioners' federal and state law claims to arbitration were not final decisions under 9 U.S.C. § 16 and, therefore, the

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Petitioners' appeals.

Ninth Circuit properly dismissed each of Petitioners' appeals for lack of jurisdiction.

In 1988, as part of the Judicial Improvements and Access to Justice Act, Pub L. No. 100-702 § 1019(a), Congress amended the standards under the Federal Arbitration Act ("FAA") by which appeals may be taken in arbitration-related cases. Under § 1019 of the Act, now codified at 9 U.S.C. § 16[5], Section 16 provides, in pertinent part, as follows:

> § 16. Appeals
>
> (a) An appeal may be taken from --
>
> (1) an order --
>
> (A) refusing a stay of any action under section 3 of this title;
>
> (B) denying a petition under section 4 of this title to order arbitration to proceed;
>
> (C) denying an application under section 206 of this title to compel arbitration;
>
> . . . .
>
> (3) a final decision with respect to an arbitration that is subject to this title.
>
> (b) Exception as otherwise provided in section 1292(b) of title 28, **an appeal may not be taken from an interlocutory order** --

---

[5] Section 16 of the FAA was originally added as § 15, but was later amended and renumbered as § 16 when it was discovered the FAA had two sections numbered 15.

(1) granting a stay of any action under section 3 of this title;
(2) **directing arbitration to proceed under section 4 of this title;**
(3) **compelling arbitration under section 206 of this title**; or
(4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16 (emphasis added).

In petitioning this Court for certiorari and contending that the district court's orders were final decisions, Petitioners rely exclusively on the facts that the district court's orders were nominally entitled orders of dismissal and that those orders did not expressly order Petitioners' claims to arbitration. Indeed, in an ineffectual effort to divert this Court's attention from the sole issue presented in this appeal, Petitioners audaciously state that the district court's opinions did not even address the issue of the arbitrability of Petitioners' claims. Petition for Writ of Certiorari at 6. Notwithstanding Petitioners' blatant misrepresentation of the district court's opinions, even a cursory review of those opinions demonstrates that the entire thrust of the district court's orders of dismissal was that the arbitration agreements executed by Petitioners were enforceable and that Petitioners' claims should be compelled to arbitration. See Appendices C and D to Petition for Writ of Certiorari. For example, in dismissing Petitioner Crisan's complaint, the district court stated that "if Crisan's U-4 Form is valid and enforceable, her case must be dismissed ***and sent to arbitration***." Appendix C to Petition for Writ of Certiorari at 6a (emphasis added). *See also* Appendix D to Petition for Writ of Certiorari at 12a ("if the arbitration clause in DiDonato's employment application is valid, her case must be dismissed *and sent to arbitration*") (emphasis added).

Because the district court ultimately concluded that both arbitration agreements were valid and enforceable, the district court's orders of dismissal, *ipso facto*, had the effect of compelling Petitioners' substantive claims to arbitration. Moreover, because the orders were entered in actions which also included substantive claims,[6] those orders were nonappealable interlocutory orders as enumerated in 9 U.S.C. § 16 (b)(3).

Furthermore, despite Petitioners' unsupported protests to the contrary, the Ninth Circuit's orders dismissing the appeals for lack of jurisdiction were fully and directly supported by the Ninth Circuit's recent decision in *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994). In *Prudential*, the Ninth Circuit explicitly recognized for the first time that an order compelling arbitration decided in the context of an "embedded proceeding" is an interlocutory order, and is not a final decision, under 9 U.S.C. § 16. Thus, the court accordingly concluded that "pro-arbitration decisions are not appealable final judgments." *Id.* at 1301. In reaching this conclusion, the court acknowledged the rule followed by a clear majority of circuits that there is a distinction for appealability purposes between "independent" proceedings, in which the "motion to compel arbitration in a given case is the only claim before the district court," and "embedded proceedings," in which the "motion to compel arbitration is 'embedded' in a substantive suit pending before the

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[6] In their Statement of the Case, Petitioners acknowledge that they asserted claims under Title VII of the Civil Rights Act of 1964 and pendent state claims in the district court. Petition for Writ of Certiorari at 3. In essence, Petitioners have conceded that the issue of the arbitrability of these claims arose in an embedded proceeding.

court." *Id.* at 1302. In independent proceedings, a decision to compel arbitration disposes of the entire case and is thus immediately appealable under 9 U.S.C. § 16(a)(3). However, in an embedded proceeding, "the district court's decision to compel arbitration of some or all of the claims before it is not considered to be final, and therefore not reviewable." *Id.*

In *Prudential*, the Ninth Circuit determined that it had jurisdiction to hear the merits of that appeal because the motion to compel arbitration was brought as an independent proceeding. *Id.* Plaintiff's complaint for monetary relief was filed in state court and the federal complaint raised only the issue of arbitration. *Id.* at 1301. In contrast, in the instant case, the issue of the arbitrability of Petitioners' claims arose in the context of their federal suits for damages in which they have alleged violations of various federal and state laws. Thus, contrary to Petitioners' assertions, the Ninth Circuit's orders dismissing Petitioners' appeals are not in direct conflict with *Prudential*, but are entirely consistent with and directly supported by that opinion.

II. Petitioners Cite No Cases To Support Their Assertion That The Ninth Circuit's Orders Of Dismissal Are In Conflict With The Decisions Of Other Circuits.

The Ninth Circuit's orders dismissing Petitioners' claims for lack of jurisdiction and the *Prudential* case are completely consistent with the law of a majority of circuits which have adopted the view that an order compelling arbitration in an embedded proceeding is not a final decision under § 16(a)(3) and is, thus, not subject to immediate appellate review, even when all claims in which the arbitration issue is embedded are resolved. *See, e.g., Adair Bus Sales, Inc. v. Blue Bird Corp.*, 25 F.3d 953

(10th Cir. 1994) (declining to hear merits of appeal where issue of arbitrability arose in context of embedded proceeding); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994) (concluding that FAA prohibits immediate appeal from interlocutory order "directing arbitration to proceed" and, thus, dismissing appeal for lack of jurisdiction); *Humphrey v. Prudential Sec. Inc.*, 4 F.3d 313 (4th Cir. 1993) (holding that order compelling arbitration in embedded proceeding was not final decision and dismissing appeal for lack of subject-matter jurisdiction); *Filanto, S.P.A. v. Chilewich Int'l Corp.*, 984 F.2d 58 (2d Cir. 1993) (holding that district court order directing arbitration was not appealable); *McDermott Intern. v. Underwriters at Lloyds*, 981 F.2d 744 (5th Cir.), *cert. denied*, _ U.S. _, 113 S. Ct. 2442, 124 L.Ed.2d 660 (1993) (dismissing appeal for lack of jurisdiction after concluding that district court order compelling arbitration was interlocutory and not appealable); *Perera v. Siegel Trading Co.*, 951 F.2d 780 (7th Cir. 1992) (holding that district court order directing plaintiff to resolve claims in arbitration was not a final decision and dismissing appeal for lack of jurisdiction). *See also Apollo Computer v. Berg*, 886 F.2d 469 (1st Cir. 1989) (recognizing distinction between embedded and independent proceedings for purposes of appealability); *Thomson McKinnon Securities, Inc. v. Salter*, 873 F.2d 1397 (11th Cir. 1989) (same).

Under the well-established authority of these circuits, an order compelling arbitration is considered final "only when it results from a proceeding in which the sole issue before the district court is the arbitrability of the dispute," *i.e.*, an independent proceeding. *Humphrey*, 4 F.3d at 317. *See also Perera*, 951 F.2d at 785 ("arbitration orders [are] final if arbitrability is the sole issue before the court and interlocutory if raised in an embedded

proceeding"). Because the Petition does not present a conflict within the circuits, it does not merit review.

The adoption of this bright-line rule is consistent with and not only promotes the often-cited federal policy favoring arbitration, but promotes the Congressional policy as evidenced in the 1988 amendments to limit appeals from orders directing arbitration. *See Filanto*, 984 F.2d at 60; *Gammaro*, 15 F.3d at 96-97 ("adoption of a bright-line rule will best advance Congress's intent" which is to "postpone review of orders compelling arbitration in embedded proceedings").

Under the definition of "final decision" adopted by these circuits, a district court's dismissal of the underlying complaint for relief and ordering arbitration is also considered to be an interlocutory order not subject to appellate review. *See McCowan v. Dean Witter Reynolds Inc.*, 889 F.2d 451 (2nd Cir. 1989). In *McCowan*, the Second Circuit Court of Appeals dismissed the appeal for lack of jurisdiction, finding that the district court's order dismissing and referring claims to arbitration was not a final appealable order. *Id.* at 452-53. In that case, investors filed suit against a brokerage firm, alleging violations of RICO and federal securities laws. The defendant moved to dismiss the complaint and requested that the court compel the claims to arbitration. *Id.* at 451-52. In its order, the district court dismissed some of the claims and merely "referred" others to arbitration. After the plaintiffs appealed, the defendant moved to dismiss the appeal on the grounds that the district court order was interlocutory. In rejecting plaintiff's argument that the dismissal order was a final decision, the court reasoned that, although the district court had only "referred" the claims to arbitration "and did not explicitly stay their [plaintiffs'] action based on these claims, we are nevertheless persuaded that the effect of the district court's

1987 Order was to stay litigation of these claims." *Id.* at 453. Finding that the district court's order of dismissal could be interpreted as a stay, the appellate court dismissed the appeal for lack of jurisdiction. *Id.*

Similarly, in *Adair Bus Sales, Inc.*, the plaintiff filed a complaint against defendant for breach of contract and requested a declaratory judgment that the arbitration clause in the agreement between the parties did not apply to the particular dispute. 25 F.3d at 953-54. The defendant moved to compel arbitration and for a stay of the underlying action pending arbitration. Although the defendant requested a stay, the district court dismissed the complaint and ordered the parties to proceed to arbitration. Plaintiff immediately appealed that decision to the Tenth Circuit. *Id.* at 954-55. In declining to hear the merits of plaintiff's appeal, the Tenth Circuit concluded that its appellate jurisdiction was limited to vacating the order of dismissal and remanding for entry of a stay pending arbitration. *Id.* at 955-56.

The court reasoned that "an order does not constitute a final decision, and is not immediately reviewable on appeal, if issues other than the propriety of arbitration are raised or relief other than a determination as to the arbitrability of the dispute is sought." *Id.* at 955. Accordingly, the court held that "[w]e decline to reach the merits of Plaintiff's appeal in light of our adoption of the majority view discouraging immediate appellate review in a proceeding in which relief other than a determination of arbitrability is sought." *Id.* *See also Gammaro*, 15 F.3d at 95 (dismissing appeal of order compelling arbitration in embedded proceeding and reasoning that "federal courts should brook no delay in requiring compliance with orders compelling arbitration"); *Humphrey*, 4 F.3d at 314 (dismissing appeal and concluding that it had no subject-matter jurisdiction to hear merits of appeal in embedded

proceeding); *Perera*, 951 F.2d at 781 (holding that appellate court had no subject-matter jurisdiction because the district court's order to arbitrate in the embedded preceding was not a final decision in that it did not resolve the merits of the underlying claims sent to arbitration).

In the instant case, it is clear that the district court's orders compelling Petitioners' claims to arbitration were interlocutory orders that were not immediately appealable. In their federal complaints, Petitioners sought relief under Title VII and various state common law theories. The orders compelling arbitration and dismissing the complaints were thus issued in the context of embedded proceedings. Accordingly, the Ninth Circuit properly concluded that it had no subject-matter jurisdiction to hear the merits of Petitioners' appeals. For the same reasons, this Court has no jurisdiction to hear the merits of the instant appeal.

CONCLUSION

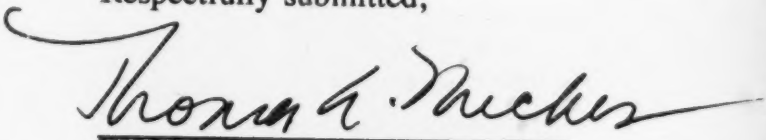
During the course of their employment with Respondent A.G. Edwards & Sons, Inc., Petitioners executed arbitration agreements. In response to Respondents' Motions to Dismiss and To Compel Arbitration, the district court concluded that both arbitration agreements were valid and enforceable and that Petitioners should pursue their claims in arbitration. The clear effect of the district court's orders granting Respondents' Motions was to compel Petitioners' claims to arbitration. The Ninth Circuit Court of Appeals properly concluded that it had no jurisdiction to hear Petitioners' appeals because the district court's orders compelled arbitration in embedded proceedings.

Petitioners have failed to present any convincing arguments with respect to how these cases satisfy this

Court's requirements for granting certiorari. This case does not present a situation in which a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals. Rather, the Ninth Circuit's decisions to dismiss Petitioners' appeals were in harmony with the law of all circuits that have addressed this issue. Furthermore, this case is not one in which a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Rather, the Ninth Circuit's orders were fully consistent with the federal policy favoring arbitration as expressed in the 1988 amendments to the Federal Arbitration Act.

Because the Court of Appeals for the Ninth Circuit properly dismissed Petitioners' appeals for lack of jurisdiction, Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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